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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1506

DONALD M. FISHER and MELVIN P. FISHER, as Trustees under the Last Will and Testament of BERNARD FISHER, deceased, ROSLYN MILLER, BERNICE GOLD and PHILIP ADLER,

Petitioners,

v.

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

SIDNEY BLUMAN, individually and as Executor of the Last Will and Testament of ISRAEL HURWITZ, deceased,

Petitioner,

v.

CITY OF SYRACUSE and SYRACUSE URBAN RENEWAL AGENCY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FOURTH DEPARTMENT

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The petitioners respectfully pray that a writ of certiorari issue to review the judgments and opinions of the Appellate Division of the Supreme Court of the State of New York, Fourth Department, entered in this proceeding on December 12, 1974.[1] This was the highest

[1] The Court of Appeals of the State of New York, by order dated March 19, 1975, denied petitioners' motion for leave to appeal.

Court of the State of New York which considered the case on the merits.

Opinions Below

The opinion of the Appellate Division and the concurring opinion of Goldman, *J.*, dated December 12, 1974, are reported in 46 A.D.2d 216, 361 N.Y.S.2d 773, and appear in the Appendix hereto. An opinion was rendered at Special Term of Supreme Court, Onondaga County, dated March 27, 1974, reported in 78 Misc.2d 124, 355 N.Y.S.2d 239, and appears in the Appendix hereto. This decision was rendered on a motion to dismiss the complaints.

Jurisdiction

An order of the Court of Appeals of the State of New York denying petitioners leave to appeal to the Court of Appeals was entered March 19, 1975 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

Question Presented

Where a condemnor includes certain property in a proposed improvement area, such as a renewal area, and over a period of many years condemns many parcels contiguous to and in the vicinity of such property, thereby creating what is known as "condemnation blight," resulting in devaluation of the property, loss of rental income, payment of excessive insurance premiums and expenses to protect the property from vandalism, even though the property has not been "taken" either *de facto* or *de jure*, may not the condemnor be held liable for such damages

on the theory of violation of the due process and equal protection clauses of the Fourteenth Amendment?

Constitutional Provisions Involved

Fourteenth Amendment of the United States Constitution

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Both actions are brought on the theory of "condemnation blight" for damages by reason of the diminution in property value, lost rental income and increased and unrequited costs of maintenance and protection of property.

The petitioners, plaintiffs in each of the actions herein, are respectively the owners in fee of certain parcels of improved property more specifically described in the complaints.

The complaints allege as follows:

> (a) Beginning in 1962 plans, affecting the area in which their properties are located, were commenced for a comprehensive urban renewal in the form of a General Neighborhood Renewal Plan. In April of 1964 the Common Council of the City of Syracuse approved an ordinance authorizing City sponsorship of an application to the Federal Government for a planning grant and thereafter received a grant. On September 12, 1966, the Common Council approved an initial partial acquisition for the purposes of the plan. On October 14, 1966, the City of Syracuse submitted a

plan of acquisition of another part of the renewal area, which plan included the plaintiffs' properties. On June 10, 1969, the Common Council of the City of Syracuse changed the project from General Neighborhood Renewal Plan to Neighborhood Development Plan and on June 22, 1969, the Common Council approved the project. For more than ten years, the above mentioned events and activities associated with such events were the subject of wide and frequent publicity in the newspapers in the City of Syracuse and the subject of frequent correspondence and conferences between the parties to these actions.

(b) Pursuant to the foregoing plans and authorizations the respondents have acquired title to many parcels in the area and to several parcels in each of the blocks in which the petitioners' respective properties are located. Many buildings have been demolished and others have been boarded up.

(c) As a result of the inordinately long and dilatory tactics of the respondents, the vicinity of the petitioners' properties has suffered a condemnation blight which has transformed the area into one which is highly undesirable for either residential or commercial purposes. The area has become a high-crime area, vandalism is rampant, and it is not safe to live or work there. Both residential and commercial tenants have moved from the area, the petitioners have lost substantial amounts of rental income, they have been placed in a special insurance pool which forced them to pay excessive premiums, they have been compelled to expend monies to protect the property from vandalism, and their property has been drastically reduced in value.

(d) Although petitioners' properties are in the renewal area and although the Bluman properties throughout the foregoing periods have been designated for acquisition, no proceedings have been commenced to condemn the said properties nor has any step been taken to compensate the petitioners for the damage which they have suffered as a result of the foregoing action of the respondents.

The constitutional question involved was raised in the complaints which are included in the Appendix hereto.

Reasons for Granting the Writ

The actions of the respondents, imposing a condemnation blight upon the petitioners for an unreasonable period of time, constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

The sole issue in these causes is purely one of law. The actions at bar are not based upon an alleged *de facto* taking nor do the petitioners seek to compel the respondents to institute proceedings for the condemnation of their properties. They seek merely to recover damages by reason of a violation of due process and the equal protection of the laws.

The facts are undisputed and show a classic example of condemnation blight as a result of urban renewal activities by the respondents extending over a period in excess of eleven years. The area has for many years been rendered undesirable for either residential or commercial purposes. It is now a high-crime area; vandalism is rampant; and it is not safe to live or work there. As a result both

residential and commercial tenants have moved from the area.[2]

The foregoing undisputed conditions have resulted in the following conceded items of damage:

(1) Loss of rental income;

(2) Excessive insurance premiums;

(3) Unrequited expenses to protect the property from vandalism; and

(4) Reduction in value of the properties.

A. *As to reduction in value of the properties.*

Despite the depreciation in value of the properties, if ultimately the property is acquired by eminent domain, the law is established that the condemnee will be made whole by allowing the value on the date of the taking as unaffected by the depreciating influence of the condemnation blight. Thus, in *City of Buffalo* v. *J.M. Clement Co. Inc.*, 28 N.Y. 2d 241, 321 N.Y.S. 2d 345, 269 N.E. 2d 895 (1971), the Court of Appeals said (28 N.Y. 2d, at 255; 321 N.Y.S. 2d, at 357):

> "In such a case, compensation shall be based on the value of the property at the time of the taking, as if it had not been subjected to the debilitating effect of a threatened condemnation."

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[2] See *City of Cleveland* v. *Hurwitz*, 19 Ohio Misc. 184, 190, 249 N.E. 2d 562, 567 (1969), in which the Court said: "The central issue here is not the willful or intentional acts of the city, it is the natural and probable consequence of the acts or the failure to act on the part of the city. It is the cumulative result of many things, each in itself that might not have been totally harmful, but when impacted all together have the full force of destruction of the property * * *."

This is all well and good insofar as properties so affected in the area are ultimately actually taken if the owners have managed to survive until that date.[3] But what of those owners, such as the petitioners herein, whose properties are similarly affected depreciatively for the very same reasons, whose property has not been taken and may never be taken?

Here are parcels in the renewal area which have been adversely affected value-wise in precisely the same manner, by the same forces and for the same reasons as those parcels which have been taken. Is this the equal protection of the laws? And do not the due process factors which protect owners whose property is taken also protect those whose property is not taken?

This Court should give due regard to the basic constitutional concept that the Bill of Rights was deliberately added to the Federal Constitution as a means of guaranteeing the individual's *personal* rights. Indeed, Justice Holmes made the well-known observation that constitutions deal "with persons, not with tracts of land" (*Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195, 54 L.E.d. 725, 30 S.Ct. 459 [1910]). Only recently Justice Stewart, in *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 551-2, 31 L.Ed. 2d 424, 434-5, 92 S.Ct. 1113, 1121-2 (1972), said:

> "The federal courts have been particularly bedeviled by 'mixed cases' in which both the personal and property rights are implicated, and the line between them has been difficult to draw with any consistency or principled objectivity. The case before us presents a

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[3] Compare *Sarff* v. *City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P. 2d 1345 (1972), where the debilitating effect of pre-condemnation blight caused the owner to lose his title by foreclosure prior to the taking by the city.

good example of the conceptual difficulties created by the test.

"Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. *Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.*" (Emphasis added.)

Even more recently, in dealing with the concept of just compensation, this Court in *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 478, 35 L.Ed. 2d 1, 10, 93 S.Ct. 791, 797 (1973), said:

"'The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, United States v. Commodities Trading Corp., 339 U.S. 121, 124, 70 S.Ct. 98, 94 L.Ed. 525 (1950), as it does from technical concepts of property law.' United States v. Fuller, 409 U.S. 488, at 490, 35 L.Ed. 16, 20, 93 S.Ct. 801, 803."

B. *As to the incidental damages—loss of rental income, excessive insurance premiums and unrequited expenses to protect the property from vandalism.*

The further question arises as to economic losses produced by the blight other than the depreciation in value of the property itself—specifically, the loss of rents by reason

of the fact that tenants have failed to renew their leases and have vacated the premises, and the fact that the petitioners have been compelled, despite the absence or sharp reduction of income, to continue payments for taxes, increased insurance premiums, interest on mortgages, and increased costs of maintenance.

This is not to say that condemnation blight is equivalent to a *de facto* taking.[4] The point here is that the rationale which permits the valuation of the property to be made as of the date of formal acquisition, excluding consideration of the affirmative value-depressing acts implicit in condemnation blight, also justifies the consideration of lost rentals and other expenses directly attributable to the same cause.

If the owner is to be made truly whole, recognition should be given to the fact that condemnation blight can and does bring about two elements of damage:

(1) Diminution in the value of the property taken; and

(2) Loss of rentals and subjection to added expenses and costs during the period from the onset of condemnation blight to the time of the formal taking.

The courts have protected the owner as to the first element of damage, at least where the property is taken, but have spoken only sparsely as to the second. Disposition of the first element of damage by preserving the value against the debilitating effect of condemnation blight only accomplishes half the job of protecting the owner where

[4] See, however: *Foster* v. *City of Detroit, Michigan*, 254 F.Supp. 655, 661-664 (Dist. Ct., E.D. Mich., S.D., 1966), aff'd 405 F.2d 138, 144 (6th Cir., 1968); *Drake's Bay Land Co.* v. *United States*, 424 F.2d 574 (Ct.Cl., 1970); *Amen* v. *City of Dearborn*, 363 F. Supp. 1267 (Dist. Ct., E.D., Mich., S.D., 1973).

there have been serious and substantial interim damages caused by the blight. Compensating the owner for the full undepressed *value* of his property does not compensate him for the lost *fruits* of that property while he remains as owner of the property and for the unrequited expenses he is put to in order to *preserve* his property until it is formally taken by the condemnor.

The rationale justifying the compensability of incidental damages generally, and rental losses and expenses specifically, under the "just compensation" clause and the rejection of the old concept of noncompensability under the "property" clause is fully supported by a recent decision of the Wisconsin Supreme Court—*Luber* v. *Milwaukee County*, 47 Wis. 2d 271, 177 N.W. 2d 380 (1970).

At issue in this case was the constitutionality of a new statute which allowed a limited recovery of pre-taking rental losses. The Court held that, since the owner had a constitutional right to the recovery of such loss, the statute was unconstitutional in that it limited such right. The Court said (177 N.W. 2d, at 383):

> "It is the respondents' position that compensation should be awarded for the physical property taken and that such was done when they awarded the fair market value of appellants' property. Respondents also maintain that 'consequential' damages, except as are provided by the legislature are *damnum absque injuria* and are to be suffered in legal silence. They justify the limitations of sec. 32.19(4), Stats., by, in effect, saying that what the legislature giveth, the legislature can taketh away.
>
> "Although such justification ignores the possibility that compensation for rental loss is a constitutional necessity rather than a legislative dole, much authority

exists for the proposition that the constitution does not require compensation for consequential losses."

The Court considered the "property" concept, saying (177 N.W. 2d, at 384):

"The question often before this court is thus whether there has in effect been a taking. In answering this question a court of necessity must define property and determine what *interests* in property are significant enough to be protected from a taking without compensation. In the instant case there is no question that the appellants' entire building was taken. The question is whether there are any *interests*, other than the building itself, for which appellants are constitutionally entitled to compensation.

"Although the rule of no recovery for incidental or consequential damages has always prevailed in this country, it has been severely attacked by many legal scholars. Part of the reason for such attacks is that 'just compensation' clauses have often been interpreted to require compensation only when property is damaged, as distinguished from damages to the property owner. In other words, 'just compensation' has been considered an *in rem* rather than an *in personam* right.

"It is the opinion of some writers that the fair market value standard of compensation . . . erroneously analyses the condemnor-condemnee relationship in terms of existing real and personal property concepts without regard to economic implications of the situation . . .

". . . In theory, the market value standard is directed toward compensating the condemnee for the *physical* property loss suffered; thus it generally excludes

recompense for incidental losses—losses typified by damage to or destruction of good will, expenses incurred in moving to a new location and profits lost because of business interruption or inability to relocate. In denying these losses, courts have recognized that such action constitutes a derogation of the indemnity principle and makes 'harsh' law. Nonetheless, the practice continues, justified by reasoning which, upon critical examination, reflects dubious wisdom and logic.

"We think that under property concepts one's interest in rental income is such as to deserve compensation under the 'just compensation' provision of the Wisconsin Constitution." (Emphasis added.)

Finally, the Court concluded (177 N.W. 2d, at 386):

"We believe that one's interest in rental loss is such as is required to be compensated under the 'just compensation' clause of art. I, sec. 13, Wis. Const. Sec. 32.19 (4), Stats., insofar as it limits compensation for the taking of such interest is in conflict with the state constitution. The rule making consequential damages *damnum absque injuria* is, under modern constitutional interpretation, discarded and sec. 32.19 (4), Stats., insofar as it limits compensation is invalid."

The Courts below attempted to distinguish the *Luber* case from the cases at bar by stating that the cited case involved an interpretation of "just compensation". But that is exactly the point we make for compensability. Wisconsin, like New York, is a "taking" state (Wis. Const. Art. I, sec. 13). The thrust of the *Luber* case is a shift from emphasis on the "taking" clause to emphasis on the "just compensation" clause—a shift from consideration of "property" *per se* to consideration of the "rights of owners" to

recover for real and actual losses which result from governmental action even though that action falls short of taking in the technical legal sense.

Even more recent than the *Luber* case is the decision of the California Supreme Court in *Klopping* v. *City of Whittier* and *Sarff* v. *City of Whittier*, 8 Cal. 3d 39, 104 Cal. Rptr. 1, 500 P. 2d 1345 (1972). These were actions in inverse condemnation for damages based on the original intent to condemn and on the resolution abandoning the condemnation proceeding and simultaneously announcing the city's intention to resume eminent domain action in the future.

The plaintiffs claimed that the fair market value of their properties declined as a result of the defendant's two announcements of intent to condemn made prior to instituting eminent domain proceedings. They contended also that because of the condemnation cloud hovering over their lands, they were unable fully to use their properties and that this damage, reflected in loss of rental income, should be recoverable. The Court agreed, holding that the test of liability was "the adverse economic effect of pre-condemnation publicity" (500 P. 2d, at 1351) rather than the *de facto* concept.

Responding to the owners' additional contention that they were unable fully to use their properties and thereby suffered a loss of rental income, the Court said (500 P.2d, at 1356):

> "If as a result of precondemnation statements rental income is lost, the anticipated rental income would be diminished and a decline in the fair market value would follow. While we reiterate that the valuation date set statutorily at the issuance of the summons remains

> intact, if the steps taken toward condemnation are to be disregarded when the condemnor acts reasonably, the condemnee must be compensated for loss of rental income attributable to such precondemnation publicity."

Certainly, in the case at bar this Court should find no difficulty, under the criterion of unreasonable delay, in finding liability. For a period in excess of eleven years the petitioners have been in limbo; their property has been sterilized; and all of the adverse effects of the dark cloud of condemnation blight have brought them economic ruin.

Perhaps the trend to greater recognition of these very real actual losses can be summerized in the words of Professor Donald G. Hagman, of U.C.L.A., who said:

> "Perhaps further recognition that property has no feelings and that it is the dislocated owners and tenants who should be paid personal damages in addition to real property damages will lessen *property* blight." (Hagman, "Planning [Condemnation] Blight, Participation and Just Compensation: Anglo-American Comparisons, "4 Urban Lawyer, No. 3, pp. 434, 460 [Summer 1972]. Emphasis in the original.)

Manifesting this trend is the recent Connecticut case of *Levine* v. *City of New Haven*, 30 Conn. Sup. 13, 294 A. 2d 644 (1972), which involved, among others, causes of action for damages by reason of violations of the due process and equal protection clauses of the constitution.

In sustaining the complaint, the Court said (204 A. 2d, at 645):

> "This court is of the opinion that if long periods of time elapse after initial condemnation proceedings and

there is no 'taking' for as long as, in this case, nine years, the property owner has a constitutional right to have his claim litigated.

"There is no question that property located within redevelopment project areas suffers drastically and that governmental authorities should minimize property owners' monetary losses as well as their frustrations. * * *

"The issue was clearly defined in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322: 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. *But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.* One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.'" (Emphasis added.)

The conceded facts in the case at bar clearly establish that the magnitude of the damages has reached a degree of severity warranting compensation. Special Term was in error when it characterized the cited case as one based on a "*de facto* taking" because the action was in the form of an inverse condemnation proceeding. The rationale of the case evinces a cause of action (inverse condemnation) based on "condemnation blight", not on a "*de facto* taking".

The Court below, in concluding that a "taking" was the *sine qua non* of a cause of action, relied on three cases—*Danforth* v. *United States*, 308 U.S. 271, 84 L.Ed. 240, 60 S.Ct. 231 (1939); *City of Buffalo* v. *J. W. Clement Company*, 28 N.Y. 2d 241, 321 N.Y.S. 2d 345, 269 N.E. 2d 895 (1971); and *Sayre* v. *City of Cleveland*, 493 F.2d 64 (6th Cir. 1974).

But *Danforth* involved an alleged taking of property. The Court agreed with the respondents that there had been no taking. *Danforth*, however, is distinguishable from the case at bar in that it involved an alleged act of eminent domain and liability was predicated on an eminent domain concept under the eminent domain provision of the constitution, whereas, in the case at bar the petitioners expressly disavow the concept of taking, do not press their claim on an eminent domain basis or under the eminent domain provision of the constitution, but lay their claims on a violation of due process, an entirely separate constitutional right. The latter has never before been argued in this Court.

The *Clement* case, too, involved eminent domain, not due process.

Sayre v. *City of Cleveland, supra,* concluded with the statement (493 F.2d, at p. 70):

> "[T]here is no de facto taking of properties which have decreased in value because of an urban renewal project unless there is a physical invasion, damage or injury, or a restraint of some type, or action by the City to appropriate such properties."

The entire rationale of the *Sayre* case, although nominally considered in a "due process" frame, is based on the presentation of a claim predicated on a "de facto" taking, an eminent domain concept.

By citing the foregoing cases the Court below has begged the issue, not met it. The Court below has concluded that there has been no taking in the case at bar and that a taking is essential to liability. We agree, although there is authority to the contrary, that there has been no taking. We allege that fact in our complaints. But we assert that he conceded facts of this case have resulted in conceded substantial damages and that the respondents are liable for such damages, not under the eminent domain provision of the Constitution, but under the due process clause.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Division of the Supreme Court of the State of New York, Fourth Department.

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